inference be attached to this provision, it is clear that in neither of the above cases can the payee be a holder in due course, which is contrary to the doctrine apparently established in New York. It is also clear that if the plaintiff can be brought within the phrase, "holder in due course," it is of no consequence that the drawer of the check received no consideration.

Adopting the court's assumption that, when the improper negotiation is by an agent, the payee may be a holder in due course, it would seem necessarily to follow that when the improper negotiation is by a thief, representing himself to be an agent, the conclusion must be the same. Surely, the payee must be considered as much "on notice" in the former case as in the latter. While the two cases are clearly distinguishable in fact, yet the language of the N. I. L. would seem to be sufficiently comprehensive to include both.

S. F. D.

SERVICE BY PUBLICATION TO OBTAIN PERSONAL JURISDICTION OVER A RESIDENT WHO CANNOT BE FOUND

The problem of acquiring such jurisdiction as will validate a personal judgment against one who is a resident of the state issuing process, but who is not to be found therein, is complicated, in most decisions, by uncertainty of distinction as to the restrictions upon such a proceeding. Although it was perhaps true at common law that as a rule jurisdiction had to be based on the fact that the person or the thing was within the territory,[1] this requirement was not a necessary element of our legal scheme and has been abrogated by statute in many common-law jurisdictions. Even in an action *in rem,* where service by publication is universally recognized as valid, the jural relations of the absent owner are altered so far as his connection with the *res* is concerned. The step from such an adjudication to one which imposes a general liability or duty on a person absent from the jurisdiction is but a matter of degree and one which common-law tribunals have found themselves, under appropriate statutes, perfectly able to take. For example, an English court has no difficulty, in a divorce suit brought in England, in giving a judgment for money damages

[1] Story, *Conflict of Laws,* sec. 539.

against the co-respondent who is in, and a resident of, Scotland.[2] A New Zealand law allowing the court at discretion to proceed to a personal judgment against an absentee, on a contract to be performed in New Zealand, is considered quite in harmony with fundamental principles of justice.[3] Under these statutes service is usually had by the giving of actual notice outside the jurisdiction, rather than by publication within the jurisdiction. In our own country, before the War Amendments to the Constitution, many cases recognized the power to give such a judgment, binding in the state where it was rendered even though denied validity abroad.[4] These decisions involved both defendants who were residents or citizens of the state rendering the judgment and defendants who resided in other states or countries. It would seem, then, that aside from express constitutional restrictions, or those assumed to be implied from the nature of our government, there is no lack of power in a state court to render a personal judgment, valid within the state, against a defendant—be he resident, citizen or neither—who was not, at the time of trial, personally served within the jurisdiction. In so far as the dicta of *Pennoyer v. Neff*,[5] the explicit rulings in a few decisions such as *De La Montanya v. De La Montanya*,[6] and an occasional author seek to propound some natural law which would, aside from constitutional limitations, prevent such a judgment from being binding within the state, they cannot be sustained.

It is undeniably true, on the other hand, that since the enactment of the Fourteenth Amendment want of due process has to a certain extent invalidated personal judgments not based on personal service within the state. It is well settled that if the absent defendant is not domiciled within the state, no such judg-

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[2] *Rayment v. Rayment & Stuart; Chapman v. Chapman & Buist* [1910] P. 271.

[3] *Asbury v. Ellis* [1893] A. C. 339.

[4] *Thompson v. Emmert* (1846) 4 McLean, 96; *Kane v. Cook* (1857) 8 Cal. 449; *Middlesex Bank v. Butman* (1848) 29 Me. 19; *Phelps v. Brewer* (1852) 9 Cush. (Mass.) 390; *Woodward v. Tremere* (1828) 6 Pick. (Mass.) 354; *Bigger v. Hutchings* (1830) 2 Stew. (Ala.) 445; *Downer v. Shaw* (1851) 22 N. H. 277; *Davidson v. Sharpe* (1845) 28 N. C. 14; *Price v. Hickok* 39 Vt. 292; *Butterworth v. Kinsey* (1855) 14 Tex. 500; *contra, Barkman v. Hopkins* (1850) 11 Ark. 157; *Dearing v. Bank of Charleston* (1848) 5 Ga. 497.

[5] (1877) 95 U. S. 714, 733.

[6] (1896) 112 Cal. 101, 110.

ment can be given after service by publication merely, inasmuch as sufficient notice and a reasonable opportunity to be heard, have supposedly not been given. The decision will not be binding even in the state where it is given,[7] and may be attacked on the same ground as a denial of due process of law at home or abroad.[8] Whether this interpretation of due process is to be viewed merely as the crystallization of a rule assumed by some courts to be impliedly inherent in our constitutional structure, or as a distinct addition thereto, is now relatively unimportant. The fact that *Pennoyer v. Neff*, though decided in 1877, passes upon an Oregon judgment rendered in 1866, two years before the Fourteenth Amendment was proclaimed to be in force, would tend to indicate that the former is the true position.[9] It is not the purpose here to discuss the wisdom of such a rule as regards non-citizens, but, assuming it, to determine whether its extension to the case of residents or citizens temporarily absent, is warranted. The field is somewhat further narrowed by the fairly prevalent view that if the defendant resident can be found within the state to be personally served, nothing else will constitute due process.[10] From the standpoint of a court so deciding, it may be argued that it is somewhat difficult to understand how service by publication becomes sufficient to satisfy the requirement merely because the defendant is not within the jurisdiction. The argument based upon lack of notice and reasonable opportunity to be

[7] *Griffith v. Milwaukee Harvester Co.* (1894) 92 Ia. 634; *Lanning v. Twining* (1906) 71 N. J. Eq. 573; *Winfree v. Bagley* (1889) 102 N. C. 515; *Farmers, etc., Bank v. Carter* (1889) 88 Tenn. 279; *Thurston v. Thurston* (1894) 58 Minn. 279; *Arnold v. Kahn* (1885) 67 Cal. 472; *Denny v. Ashley* (1888) 12 Col. 165; *Cloyd v. Trotter* (1886) 118 Ill. 391.

[8] *Pennoyer v. Neff, supra; Louisville & N. R. Co. v. Nash* (1897) 118 Ala. 477; *Anderson v. Goff* (1887) 72 Cal. 65; *Marten v. Kittredge* (1887) 144 Mass. 13; *McKinney v. Collins* (1882) 88 N. Y. 217.

[9] It should be noted that the decision in *Pennoyer v. Neff*, on the facts of the case, determines merely that the Circuit Court of the United States was not bound to recognize the validity of the Oregon proceedings. Whether the courts of Oregon itself were bound by the Constitution to treat the judgment and proceedings under it as void was not involved, although, of course, the opinion discusses the question.

[10] *Arnold v. Boggs* (1915) 129 Minn. 270; *McNamara v. Casserly* (1895) 61 Minn. 335; *Bardwell v. Collins* (1890) 44 Minn. 97; *Hockaday v. Jones* (1899) 8 Okl. 156; *Friedman v. First Nat. Bank of Cleveland* (1913) 135 Pac. (Okl.) 1069; *Insurance Co. v. Robbins* (1897) 53 Neb. 44; *Bixby v. Bailey* (1873) 11 Kan. 359; *Brown v. Woody* (1877) 64 Mo. 547.

heard, however, does not apply to service by actual notice given to the defendant outside the jurisdiction, as in the English cases cited above. Here the only question is whether to expect the defendant to defend the suit is, under the circumstances, so arbitrary and unreasonable as not to be due process of law. Again, approaching the problem with our first assumption in mind, is there sufficient difference in the status of an absent resident, or citizen even, from that of a non-resident, so that the former must be held reasonably to contemplate the rendition of personal judgments against him without actual notice, while the latter need not? Geographically the resident may be as far removed as the non-resident. If the incidents of domicile or citizenship are sufficient to direct his attention so that publication will be due notice, why is it not all the more true when he is again within his home state? The courts which deny that jurisdiction over the absent resident may be obtained by publication are perhaps the more consistent,[11] although it may fairly be said, on the other hand, that due process means the doing of what is reasonable under the circumstances, and that personal service is required where it may easily be had, as where the defendant can be found in the state. For the reason last stated, a substantial number of states will recognize as binding a personal judgment based on service by publication or service without the state, whether the defendant resident who cannot be found is in fact within the state[12] or outside.[13] To such courts the actual location of the defendant need cause no concern. That the man sought was known to be within the state borders was for this reason apparently not a necessary factor in the recent case of *Roberts v. Roberts*,[14] which decided for Minnesota for the

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[11] *Pinney v. Providence Loan and Investment Co.* (1900) 106 Wis. 396 (*semble*); *De La Montanya v. De La Montanya, supra; Raher v. Raher* (1911) 129 N. W. (Ia.) 494; *Bernhardt v. Brown* (1896) 118 N. C. 700. Cf. *Bickerdike v. Allen* (1895) 157 Ill. 95 (*scire facias* to revive a judgment; publication void, though service by mailing held equivalent to personal service).

[12] *Betancourt v. Eberlin* (1882) 71 Ala. 461; *Harryman v. Roberts* (1879) 52 Md. 65; *Northcraft v. Oliver* (1889) 74 Tex. 162.

[13] *Hamill v. Talbott* (1897) 72 Mo. App. 27; (1899) 81 Mo. App. 210; *Hervey v. Hervey* (1897) 56 N. J. Eq. 166; *Fernandez v. Casey & Swazey* (1890) 77 Tex. 452; *Henderson v. Staniford* (1870) 105 Mass. 504; *Martin v. Burns, Walker & Co.* (1891) 80 Tex. 676.

[14] (1917) 161 N. W. (Minn.) 148.

first time the validity of a personal judgment when against a resident of the state where service was had by publication for the reason that the defendant could not be found, although known to be within the state. It might prove a turning point with courts which deny the availability of publication against residents absent from the state. Certainly the effectiveness of such notice would in all probability be greater against one within the state. In general, however, such courts have broadly repudiated the entire validity of the type statute[15] providing for service by publication where the resident defendant cannot be found.

C. B.

THE ADAMSON ACT

In the recent test case before the Supreme Court of the United States[1] the constitutionality of the Adamson Eight Hour Service Act was upheld by a vote of five to four. In a vigorous opinion Chief Justice White held the act to be within the powers of Congress under its authority to regulate interstate commerce.

It is important to note that at the outset the Chief Justice conceded that the act prescribed a minimum rate of wages and that the right to fix a standard of wages is primarily private and, as such, guaranteed against invasion by Congress. Thus it became necessary to justify the exercise of power primarily on the authority vested in Congress to regulate interstate commerce and, secondarily, on the policy of the government that the public interests of society in the continued operation and promotion of interstate transportation subjects those engaged therein to a public power of regulation.[2] The court held that the power to regulate interstate commerce fundamentally included the power to preserve an uninterrupted flow through its channels and to guard against cessation threatened by the failure of carriers and employees to agree upon the terms of a contract of employment.

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[15] (1913) Minn. Gen. Sts., sec. 7738.

[1] *Wilson v. New and Ferris, Receivers* (March 19, 1917) U. S. Sup. Ct., Oct. Term, 1916, No. 797. This article is merely a statement of the substance of the decision.

[2] In *Munn v. Illinois* (1877) 94 U. S. 113, the court held: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."